No. 93-1631

(6)

In the Supreme Court of the United States

OCTOBER TERM, 1994

LLOYD BENTSEN, SECRETARY OF THE TREASURY,
PETITIONER

v.

COORS BREWING COMPANY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Section 5(e)(2) of the Federal Alcohol Administration Act, 27 U.S.C. 205(e)(2), prohibits statements of alcohol content on the labels of malt-beverage containers unless such statements are required by state law. The question presented is whether that labeling restriction comports with the First Amendment.

PARTIES TO THE PROCEEDING

Petitioner, the defendant below, is the Secretary of the Treasury. The other defendant below was the Director of the Bureau of Alcohol, Tobacco and Firearms within the Department of the Treasury. Respondent is the Coors Brewing Company, which was substituted for the Adolph Coors Company, the plaintiff below, pursuant to this Court's order of August 2, 1994, granting respondent's motion for substitution. Also participating in the proceedings below were the Speaker and Bipartisan Leadership Group of the United States House of Representatives, which initially participated as defendants-intervenors but later withdrew from the case in order to allow defendants to be represented exclusively by the Department of Justice.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 2 F.3d 355. The prior opinion of the court of appeals (Pet. App. 10a-31a) is reported at 944 F.2d 1543.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 1993. A petition for rehearing was denied on December 1, 1993. Pet. App. 55a-56a. On February 22, 1994, Justice Ginsburg extended the time for filing a petition for a writ of certiorari to and including March 31, 1994. On March 22, 1994, Justice Ginsburg further extended the time for filing a petition for a writ of certiorari to and including April 15, 1994, and the petition was filed on that date. The petition for a writ of certiorari was granted on June 13, 1994. Joint Appendix (J.A.)

363. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law * * * abridging the freedom of speech."

The Twenty-first Amendment to the United States Constitution provides in pertinent part:

> **Section 2.** The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 5 of the Federal Alcohol Administration Act (FAAA), 27 U.S.C. 205, is reproduced at Pet. App. 57a-65a.

Section 7 of the FAAA, 27 U.S.C. 207, provides in pertinent part:

> Any person violating any of the provisions of section * * * 205 of this title shall be guilty of a misdemeanor and upon conviction thereof be fined not more than $1,000 for each offense.

The relevant portions of 27 C.F.R. 7.26, 7.29, and 7.54 are reproduced at Pet. App. 66a-72a.

STATEMENT

This case concerns the constitutionality of a portion of 27 U.S.C. 205(e)(2), a provision in the Federal Alcohol Administration Act (FAAA or Act), 27 U.S.C. 201 *et seq.* Section 205(e)(2) in relevant part prohibits statements of alcohol content on the labels of malt beverages, unless such statements are required by state law. Congress enacted the labeling restriction in Section 205(e)(2) to curb "strength wars" among brewers of malt beverages

such as the one that arose after Prohibition was repealed. The Tenth Circuit held that the labeling restriction violates the First Amendment. This Court granted certiorari to review that holding.

A. The Statutory And Regulatory Background

1. The FAAA, 27 U.S.C. 201 *et seq.*, was enacted "[i]n order effectively to regulate interstate and foreign commerce in distilled spirits, wine, and malt beverages, to enforce the twenty-first amendment, and to protect the revenue and enforce the postal laws with respect to distilled spirits, wine, and malt beverages." 27 U.S.C. 203.[1] To carry out those purposes, Section 2(a) of the Act created the Federal Alcohol Administration (FAA) as a division within the Department of the Treasury. FAAA, ch. 814, 49 Stat. 977 (1935), repealed by the Liquor Tax Administration Act, ch. 830, § 501(a), 49 Stat. 1964 (1936) (making FAA an independent establishment of the government). Sections 3 and 4 of the Act required certain participants in the alcoholic beverage industry (other than brewers) to obtain a permit from the Secretary of the Treasury. 49 Stat. 978-981 (current versions at 27 U.S.C. 203, 204). Section 5 of the Act proscribed certain types of "[u]nfair competition" and "unlawful practices." 49 Stat. 981-985 (current version at 27 U.S.C. 205). Violations of Section 5 were punishable as misdemeanors under Section 7, 49 Stat. 985-986 (current version at 27 U.S.C. 207), and by suspension or revocation of a permit under Section 4(d) and (e),

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[1] See also *National Distributing Co.* v. *United States Treasury Dep't*, 626 F.2d 997, 1004 (D.C. Cir. 1980) (discussing history and purpose of FAAA); *Continental Distilling Corp.* v. *Shultz*, 472 F.2d 1367, 1369-1370 (D.C. Cir. 1972) (same); *William Jameson & Co.* v. *Morgenthau*, 25 F. Supp. 771, 774 (D.D.C. 1938) (three-judge court) (rejecting constitutional challenge to FAAA), vacated for lack of substantial federal question, 307 U.S. 171 (1939) (per curiam).

49 Stat. 979 (current versions at 27 U.S.C. 204(d) and (e)).[2]

This case involves a challenge to the portions of the Act codified as Section 205(e)(2) and Section 205(f)(2) of Title 27. Those provisions prohibit numerical and descriptive statements of alcohol content on the labels of malt-beverage containers and in advertisements for malt beverages.[3] Section 205(e)(2) requires the containers of all alcoholic beverages to be labeled

> in conformity with such regulations * * * [of the Secretary] (2) as will provide the consumer with adequate information as to the identity and quality of the products [and] the alcoholic content thereof

[2] Neither the FAAA nor any other federal statute restricts the amount of alcohol that malt beverages may contain. That matter has been left to the States, consistent with the long "history of state regulation of alcoholic beverages" and Congress's solicitude for the States' broad discretion in this area. See *Craig* v. *Boren*, 429 U.S. 190, 205-206 (1976); see also *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 107 n.10 (1980). In turn, many States restrict the alcohol content of malt beverages. See J.A. 357-360 (survey of state laws).

[3] The term "malt beverage" is defined by statute (27 U.S.C. 211(a)(7)) and regulation (27 C.F.R. 7.10) as:

> A beverage made by the alcoholic fermentation of an infusion or decoction, or combination of both, in potable brewing water, or malted barley with hops, or their parts, or their products, and with or without other malted cereals, and with or without the addition of unmalted or prepared cereals, other carbohydrates or products prepared therefrom, and with or without the addition of carbon dioxide, and with or without other wholesome products suitable for human food consumption.

Thus, the term "malt beverage" encompasses all types of what is commonly referred to as "beer," and hereafter we use the two terms interchangeably. For purposes of this case, however, it is important to distinguish the terms "malt beverage" and "malt liquor." While the term "malt beverage" includes "malt liquor," the latter term is not defined by the FAAA or regulations; rather, it is a term that has come to be used in the industry to refer to the type of beer with the highest alcohol content. See Pet. App. 7a n.4; J.A. 208.

> (*except that statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages are prohibited unless required by State law* * * *).

27 U.S.C. 205(e)(2) (emphasis added). Section 205(f)(2) requires print and broadcast advertisements for all alcoholic beverages to be

> in conformity with such regulations * * * [of the Secretary] (2) as will provide the consumer with adequate information as to the identity and quality of the products advertised [and] the alcoholic content thereof (*except the* [*sic*] *statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages and wines are prohibited*).

27 U.S.C. 205(f)(2) (emphasis added).

Both Sections 205(e)(2) and 205(f)(2) are designed to operate in a manner that is consistent with state law. The labeling restriction in Section 205(e)(2), by its terms, applies unless state law requires disclosure of alcohol content on malt-beverage labels. The advertising restriction in Section 205(f)(2) applies, by virtue of the penultimate paragraph of Section 205(f), only in States that adopt similar restrictions for beer that is wholly in intrastate commerce.[4] Thus, a State may choose whether

[4] The penultimate paragraph of Section 205(f) provides in pertinent part:

> In the case of malt beverages, the provisions of this subsection and subsection (e) of this section shall apply to the labeling of malt beverages sold or shipped or delivered for shipment or otherwise introduced into or received in any State from any place outside thereof, or the advertising of malt beverages intended to be sold or shipped or delivered for shipment or otherwise introduced into or received in any State from any place outside thereof, only to the extent that the law of such State imposes similar requirements with respect to the labeling or advertising, as the case may be, of malt beverages not sold or shipped or delivered for shipment or otherwise introduced into or received in such State from any place outside thereof.

Although the penultimate paragraph of Section 205(f) refers to Section 205(e), ATF and its predecessors have long interpreted it

the federal labeling or advertising restriction will apply within its borders.

Implementing regulations prohibit the disclosure of alcohol content on malt-beverage labels, except where disclosure is required by state law (27 C.F.R. 7.26(a), 7.29(g)), and they prohibit the disclosure of alcohol content in print and broadcast beer advertising, to the extent that the State imposes similar advertising restrictions on beer that remains in the State (27 C.F.R. 7.50, 7.54(c)). The labeling restriction covers both numerical designations of alcohol content and descriptive terms suggestive of high alcohol content, such as " 'strong,' 'full strength,' 'extra strength,' 'high test,' 'high proof,' [and] 'full alcohol strength.' " 27 C.F.R. 7.54(c); 27 C.F.R. 7.29(f). The labeling restriction does not, however, preclude beer labels or advertising that identifies a beer as "low" or "reduced" alcohol, "non-alcoholic," or "alcohol-free," in accordance with the Secretary's definition of those terms. 27 C.F.R. 7.26(b)-(d); see also 27 C.F.R. 7.29(f), 7.54(c). The labeling restriction is enforced by regulations requiring the bottlers of malt beverages to obtain certificates of label approval from the Secretary (or to obtain exemptions from that requirement). 27 C.F.R. 7.40-7.42; see also 27 U.S.C. 205(e).

2. In enacting the FAAA, Congress prohibited statements of alcohol content in malt-beverage labeling and advertising in order to curb "strength wars" among brewers of the sort that arose in the wake of the repeal of Prohibition by the Twenty-first Amendment.

As discussed in the legislative history of the FAAA, the adoption of the Twenty-first Amendment "took place

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not to require a State to enact its own malt-beverage labeling restriction in order for the federal malt-beverage labeling restriction to apply in that State. Instead, under the plain terms of Section 205(e)(2), the federal labeling restriction applies unless a State affirmatively requires disclosure of alcohol content on malt-beverage labels. See, *e.g.*, Rev. Rul. 62-95, 1962-1 C.B. 362. Coors has noted that interpretation without challenging it. See 89-1203 Resp. C.A. Br. 16 n.16.

with unexpected speed." H.R. Rep. No. 1542, 74th Cong., 1st Sess. 3 (1935). The Amendment was proposed to the legislatures of the States by the Seventy-second Congress on February 20, 1933, and was ratified by the requisite number of States less than ten months later, on December 5, 1933. See *ibid.*; 76 Cong. Rec. 4565 (1933). Because Congress was not in session at that time, the President signed an executive order to fill the perceived regulatory vacuum by approving continued regulation of the alcoholic beverage industry under the voluntary code system that had been developed pursuant to the National Industrial Recovery Act (NIRA). Exec. Order No. 6474 (Dec. 4, 1933); see H.R. Rep. No. 1542, *supra*, at 3-4. According to the committee reports on the bill that became the FAAA, the Act "[i]n general * * * incorporates the greater part of the system * * * enforced by the Government under the codes." H.R. Rep. No. 1542, *supra*, at 4; S. Rep. No. 1215, 74th Cong., 1st Sess. 3 (1935). The Tenth Circuit accordingly recognized in its first decision in this case that the history of regulations adopted under the code system is relevant to interpretation of the Act. Pet. App. 17a n.4.

The regulations initially proposed by the Federal Alcohol Control Administration (FACA) pursuant to the executive order did not prohibit numerical statements of alcohol content in beer labeling or advertising. *Hearing Before the FACA With Reference to Proposed Regulations Relative to the Labeling of Products of the Brewing Industry* (Nov. 1, 1934) (*FACA Hearing*), Clerk's Record (CR) 15, at 3-4. Instead, the proposed regulations prohibited only descriptive statements such as " 'full strength', 'extra strength', 'high test', 'high proof', [and] 'prewar proof'." *Id.* at 3. At the hearing on the proposed regulations, however, witnesses unanimously supported a broader prohibition that would bar even seemingly objective numerical designations of alcohol content. For example, the first witness at the hearing, George McCabe, counsel to the Brewers Code Authority, stated (*id.* at 7):

> We would like a regulation of the F.A.C.A. which would outlaw any declaration of alcoholic content on labels for fermented malt liquors except in States where such a requirement is made by the State law. * * * [T]he alcoholic declaration has been productive of more deception than any one part of the label. Some brewers went haywire * * * and were trying to sell their beer on an alcohol basis, and they resorted, as you all know, to the use of all sorts of numbers and figures, numerals, to convey the impression that the beer contained an excessive amount of alcohol, which it did not contain.

Mr. McCabe then read a letter from a major brewer, which he described as "fairly expressive of the general sentiment of the industry," recommending that "all reference to alcoholic content * * * be eliminated from labeling [and] advertising," in light of the "trouble with this sort of thing during the past 18 months." *Id.* at 8. Other witnesses explained that, although "the legitimate brewer does not desire to sell his beer on the basis of alcohol," but rather "as a food product" (*id.* at 25), some brewers "seem[ed] to be of the opinion that to sell beer they should sell the public alcohol" (*id.* at 29). The latter brewers' practice of disclosing alcohol content led "legitimate" brewers to conclude that "in order to meet competition it was necessary to increase the alcoholic content of the[ir] beer." *Id.* at 59. The witnesses predicted that a prohibition on statements of alcohol content would "get * * * beer back to a low alcoholic content." *Id.* at 73; see also *id.* at 33 ("if you just write the alcoholic content off the label, you are going to have a lower alcoholic content beer than you are if you require the alcoholic content to be stated on the label"). The resulting regulation provided in relevant part that "[t]he alcoholic content and/or the percentage and quantity of the original extract shall not be stated unless required by State or Federal laws or regulations." *Regulations Relating to the Labeling of Domestic Products of the Brewing Industry* § 9(a), at 4 (Mar. 1, 1935) (attached as appendix to *FACA Hearing*).[5]

The House committee report on the bill that became the FAAA expressed the judgment that "[m]alt beverages should not be sold on the basis of alcohol content." H.R. Rep. No. 1542, *supra*, at 12. It explained that "attempts to sell beer and other malt beverages on the basis of alcoholic content are attempts to take advantage of the ignorance of the consumer and of the psychology created by prohibition experiences." *Ibid.* The report found that "[l]egitimate members of the industry have suffered seriously from unfair competition resulting from labeling and advertising" that stated alcoholic content. *Ibid.* The report also found that "irrespective of th[e] falsity" of such statements, "their abuse has grown to such an extent since repeal that the prohibition of all such statements is in the interest of the consumer and the promotion of fair competition." *Id.* at 12-13. More broadly, the report concluded, based on "[e]xperience prior to prohibition," that the States "could not alone" protect their citizens from "unscrupulous advertising" and "deceptive labeling practices," due to "the diversity of their laws and the fact that practically all alcoholic beverage producers and large-scale distributors did an interstate business." *Id.* at 2-3.[6]

3. Labeling restrictions on malt beverages are currently in effect in all 50 States by virtue of either positive state law or acquiescence in the federal labeling restriction in Section 205(e)(2).

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[5] Regulation of the alcoholic-beverage industry continued under the code system until this Court struck down the NIRA in *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935). See *National Distributing Co.*, 626 F.2d at 1005; H.R. Rep. No. 1542, *supra*, at 3.

[6] The Senate report similarly found that abusive "labeling or advertising" was one of the "serious social and political evils" that "were in large measure responsible for bringing on prohibition" and that "cannot be reached by the States." S. Rep. No. 1215, *supra*, at 6-7.

Twenty-one States and the District of Columbia prohibit statements of alcohol content on the labels of some or all types of malt beverages.[7] Several States in this

[7] Ala. Code § 28-3A-6(c) (1986) (requiring brewers to file federal certificates of label approval with the State); Ariz. Comp. Admin. R. & Regs. R4-15-220(6) (1990) (requiring compliance with federal labeling requirements); Conn. Agencies Regs. § 30-6-A35(m) (1976) (expressly incorporating federal labeling requirements as state law); Del. Alc. Bev. Cont. Comm. Regs. R. 13(b) (1991) (requiring compliance with federal labeling requirements); D.C. Mun. Regs. tit. 23, § 910 (1988) (incorporating federal labeling provisions in part); *Modern Brewery Age (Blue Book)* 267 (53d ed. 1993) (digest of alcohol labeling requirements for D.C.); Ill. Admin. Code tit. 11, § 100.70(b)(9) (1991) (no beer containers "shall have affixed thereto any label or statement showing the alcoholic content thereof"); Alc. Bev. Comm'n of Ind. Bull. 23 (Aug. 4, 1938) (malt-beverage labels may not indicate alcohol content by numerals or descriptive terms); Ky. Rev. Stat. Ann. § 244.520 (Bobbs-Merrill 1981) (malt-beverage labels may not "refer[] in any manner to the alcoholic strength"); Me. Rev. Stat. Ann. tit. 28-A, § 711(1)(A) (West 1988) (malt-beverage label may not "refer[] in any manner to the alcohol content"); Mich. Admin. Code r. 436.1611 (1989) (requiring compliance with federal labeling requirements); N.J. Admin. Code tit. 13, § 2-27.1 (1990) (requiring compliance with federal labeling requirements); N.Y. Alco. Bev. Cont. Law App. § 84.6(a) (McKinney 1987) (prohibiting disclosure of alcohol content on malt-beverage labels); Ohio Rev. Code Ann. § 4301.03(D) (Supp. 1993); Pa. Stat. Ann. tit. 47, § 4-493(7) (1969) (malt-beverage labels may not "in any manner refer[] to the alcoholic contents"); R.I. Liq. Cont. Admin. Regs. No. 17 (1992) (federal labeling requirements "will be enforced" by State); S.C. Code Ann. § 61-13-800 (Law. Co-op. 1990) (requiring compliance with federal labeling requirements); S.D. Codified Laws Ann. § 39-13-11 (1987) (compliance with federal labeling requirements deemed compliance with state law); *Modern Brewery Age, supra*, at 271 (indicating that South Dakota requires malt-beverage labels to state "Not over 3.2% alcohol by weight," apparently precluding other statements of alcohol content); Tex. Admin. Code tit. 16, § 45.79 (1991) ("[t]he alcoholic content * * * shall not be stated" on malt-beverage labels); Utah Admin. R. 96-1-3(3) (1991) (requiring compliance with federal labeling requirements); Va. Alc. Bev. Cont. Bd. Regs. § 5(A)(3) (1991) (requiring compliance with federal labeling requirements); cf. Va. Code Ann. § 4.1-103.8 (Michie 1993) (Virginia Board may by regulation

category expressly incorporate Section 205(e)(2) of the FAAA or its implementing regulations.[8]

In addition, 20 States have effectively adopted Section 205(e)(2)'s prohibition on alcohol content labeling by acquiescence—*i.e.*, by not invoking their authority under Section 205(e)(2) to require such statements on labels. See Rev. Rul. 62-95, 1962-1 C.B. 362.[9]

Finally, 10 States require an alcohol-content statement on labels of malt-beverage containers, but only with respect to malt beverages above or below a certain alcohol percentage.[10]

establish labeling requirements); W. Va. Non-Intox. Beer Comm'n Regs. § 176-1-3.1 (1990) ("[t]here shall not be any statement as to alcoholic content on the bottle and can label" of malt beverages); Wis. Admin. Code § 7.21 (Dep't of Revenue) (1991) (requiring compliance with federal labeling requirements).

[8] See statutes and regulations cited in note 7, *supra*, for Alabama, Arizona, Connecticut, Delaware, Michigan, New Jersey, South Carolina, Utah, Virginia, and Wisconsin.

[9] See *Modern Brewery Age, supra*, at 266-272, which indicates that the federal prohibition of malt-beverage alcohol content statements on labels is in effect, by virtue of the State's not requiring such statements, in 19 States: Alaska, Florida, Georgia, Hawaii, Iowa, Kentucky, Louisiana, Maryland, Massachusetts (with respect to malt beverages containing more than 3.2% alcohol by weight), Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Tennessee, Vermont, and Wyoming. Our research indicates that there are two additional States, Idaho and Washington, that have acquiesced in the federal prohibition, but that Kentucky has enacted its own statute prohibiting statements of alcohol content on malt-beverage containers, rather than simply acquiescing in the federal prohibition. See Ky. Rev. Stat. Ann. § 244.520 (Bobbs-Merrill 1981), cited in note 7, *supra*.

[10] Ark. Alc. Bev. Cont. Div. Regs. § 2.17 (1991) (requiring malt beverages containing more than 5% alcohol by weight to be labeled as such); Cal. Code Regs. tit. 4, § 130 (1990) (prohibiting alcohol-content statements on labels of malt beverages containing more than 4% alcohol by weight); Colo. Code Regs. § 46-112.3.C (1993) (malt-beverage labels must indicate that alcohol content is not more than 3.2% by weight); Kan. Admin. Regs. §§ 14-7-2(c), 92-8-9a (1985) (malt-beverage labels must state "does

B. The Proceedings In This Case

1. In April 1987, the Adolph Coors Company applied to the Bureau of Alcohol, Tobacco and Firearms (ATF) within the Treasury Department for approval of proposed labels and advertisements that included statements of the alcohol content of Coors' beer. J.A. 60-65.[11] ATF denied the application based on Sections 205(e)(2) and 205(f)(2). Pet. App. 73a-74a.

2. a. In July 1987, Coors filed this action against the Secretary and the Director of ATF in the United States District Court for the District of Colorado. Coors sought a declaratory judgment that the labeling and advertising restrictions in Sections 205(e)(2) and 205(f)(2) and their implementing regulations violate the First Amendment; Coors also sought an injunction barring enforcement of those provisions. J.A. 54-59. On cross-motions for summary judgment, the district court held that both Section 205(e)(2) and Section 205(f)(2) violate the First Amendment, and it enjoined their enforcement. Pet. App. 43a-54a.

b. The Tenth Circuit reversed and remanded. Pet. App. 10a-31a. It applied the four-part test articulated in

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not contain more than 3.2% alcohol by weight"); Mass. Ann. Laws ch. 138, § 15 (Law. Co-op. 1981) (malt beverages containing 3.2% alcohol by weight or less "shall be so labelled"); Minn. R. § 7515.1110, subp. 2 (1985) (malt-beverage labels must state "contains not more than 3.2 percent of alcohol by weight"); Mo. Rev. Stat. § 312.310 (Supp. 1993) (malt-beverage labels must state "alcoholic content not in excess of [3.2% by weight or 4% by volume]"); Mont. Admin. R. § 42-13-201(2) (1993) ("[a]lcohol content by weight must be noted on the labels of all malt beverages" containing more than 7% alcohol by weight); Okla. Stat. Ann. tit. 37, § 163.19(b) (West 1985) (malt-beverage label may not indicate that alcohol content exceeds 3.2% by weight); Or. Admin. R. 845-10-205(2), (4) (1992); *Modern Brewery Age*, *supra*, at 270-271 (Oregon requires disclosure of alcohol content on labels of malt beverages containing more than 4% alcohol by weight).

[11] ATF is currently responsible for administering the FAAA. See Dep't of Treasury Order No. 120-01 (June 6, 1972) (formerly No. 221), *reproduced at* 37 Fed. Reg. 11,696 (1972).

Central Hudson Gas & Elec. Corp. v. *Public Serv. Comm'n*, 447 U.S. 557 (1980), for analyzing restrictions on commercial speech. Applying the first part of the *Central Hudson* test, the Tenth Circuit determined that Sections 205(e)(2) and 205(f)(2) regulate nonmisleading commercial speech regarding a lawful activity. Pet. App. 15a.

Applying the second part of the test, the Tenth Circuit held that the labeling and advertising restrictions are intended to further the federal government's "substantial" interest in "maintain[ing] moderate levels of alcohol in beer in order to protect the consumer." Pet. App. 19a. In that connection, the Tenth Circuit criticized the district court for "focus[ing] primarily on the validity of the asserted ends given the passage of time and changed circumstances." *Ibid.* The Tenth Circuit found it "irrelevant that the circumstances giving rise to a particular piece of legislation have changed so long as the legislation continues to serve some valid and substantial government interest." *Id.* at 20a. The Tenth Circuit concluded that the government had advanced "a legitimate and substantial interest" in this case by identifying "a continuing danger of strength wars similar to those that existed in 1935." *Ibid.*

The Tenth Circuit held, however, that there were disputed issues of fact with regard to the third and fourth parts of the *Central Hudson* test. Pet. App. 21a-31a. It determined that "the record here does not unambiguously reflect a correct legislative judgment that the enacted means directly advance the intended ends." *Id.* at 21a. In the court's view, "the link between advertising and strength wars is not self-evident," *ibid.*, and there were "genuine issues of material fact underlying the question of whether * * * the complete prohibition of [statements of alcohol content] results in a 'reasonable fit' between the legislature's goal and the means chosen to reach it," *id.* at 31a. The court of appeals accordingly reversed the order granting summary judgment in favor

of Coors and remanded the case to the district court for further proceedings. *Ibid.*

3. a. On remand, the government introduced extensive evidence concerning current conditions in the malt-beverage industry. Much of that evidence related to the malt-liquor segment of the industry. See, *e.g.*, J.A. 207-214, 217-222; see also J.A. 92-93, 108-109. The government's evidence demonstrated that a primary reason why people choose malt liquor instead of other types of beer is because of its high alcohol content (J.A. 127, 344, 348, 350, 352-353, 356), and that malt-liquor producers market their product by emphasizing its high alcohol content (J.A. 127-128, 341, 343, 345-347, 350-351, 355-356; see also Defendants' Trial Exh. (DX) CS (at 11)). The evidence included numerous recent instances of efforts to market malt beverages on the basis of high alcohol content, in violation of the FAAA's labeling and advertising restrictions. See, *e.g.*, J.A. 309-340; see also DXs R, S, and U through X. That evidence was not limited to the malt-liquor segment of the market. It showed, for example, that Coors had distributed wallet cards listing the alcohol content of its beers and those of its competitors. J.A. 206-207, 335-336, 342; see also J.A. 209-210 (Olympia beer), 216-217, 337-338 (Lowenbrau beer).

The district court upheld the advertising restriction in Section 205(f)(2), but it struck down the labeling restriction in Section 205(e)(2). J.A. 361-362; Pet. App. 32a-42a. The court found that there is a continuing threat of strength wars that justifies a prohibition on statements of alcohol content in advertising, *id.* at 34a, but it regarded labeling as different because it believed statements of alcohol content on labels would be used by consumers primarily to limit their intake of alcohol, *id.* at 37a.

b. Coors did not challenge the district court's ruling upholding the advertising restriction in Section 205(f)(2). The government, by contrast, did appeal from

the district court's ruling striking down the labeling restriction in Section 205(e)(2).[12]

c. A different panel of the Tenth Circuit affirmed. Pet. App. 1a-9a. The panel began by rejecting the government's contention that it was required, under the third part of the *Central Hudson* test, to show only that Congress "reasonably believed" that the labeling restriction would further the goal of preventing strength wars. The court expressed the view that this Court, in *Edenfield* v. *Fane*, 113 S. Ct. 1792 (1993), had adopted a "much stricter" standard for applying the third part of the *Central Hudson* test. Pet. App. 5a.

The Tenth Circuit then held that, under the stricter test, the government had failed to show that the labeling restriction furthers the goal of preventing strength wars "in a direct and material way." Pet. App. 7a.[13] The court recognized that the legislative history supported Congress's judgment that the labeling restriction would "result[] over the long term in beers with a lower alcohol content." *Id.* at 6a, quoting *id.* at 17a. But focusing on what it perceived to be "changes in the malt beverage industry," the court determined that the government's evidence of a continuing threat of strength wars was insufficient in three ways. *Id.* at 6a-9a. First, the court discounted the evidence on the ground that it primarily concerned the malt-liquor segment of the market. *Id.* at 7a. Second, the court believed that there was an "absence of any record evidence indicating that there are strength wars in states or other countries where alcohol content labeling is already required." *Id.* at 8a. Finally, the court was unable to discern any evidence that "Coors

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[12] After the district court's ruling, ATF published an interim rule suspending enforcement of the regulatory provisions that implement the statutory labeling restriction in Section 205(e)(2). 58 Fed. Reg. 21,228 (1993).

[13] The Tenth Circuit accordingly found it unnecessary to decide whether the labeling restriction satisfies the "reasonable fit" requirement of the fourth part of the *Central Hudson* test. Pet. App. 9a n.6.

would engage in a strength war if it were able to disclose the alcohol content of its malt beverages." *Id.* at 8a-9a.[14]

SUMMARY OF ARGUMENT

I. The labeling restriction in Section 205(e)(2) satisfies the *Central Hudson* test for determining whether a regulation of commercial speech comports with the First Amendment. First, Section 205(e)(2) advances the substantial federal interest of preventing strength wars among malt-beverage brewers, in a manner that facilitates state regulation of alcoholic beverages. Moreover, the continuing risk of strength wars is real, and Section 205(e)(2) combats that risk in a direct and material way. Finally, Section 205(e)(2) is narrowly tailored to achieve that purpose.

The Tenth Circuit misapplied the *Central Hudson* test in declaring Section 205(e)(2) unconstitutional. In applying the second part of the test, the Tenth Circuit failed to identify fully the federal interest that Section 205(e)(2) was designed to serve. Specifically, the court ignored clear evidence that Congress intended Section 205(e)(2) to operate in tandem with, and facilitate the enforcement of, state laws regulating alcoholic beverages.

In applying the third part of the *Central Hudson* test, the Tenth Circuit made several errors. The court failed to recognize the self-evident proposition that, if the advertising of a product characteristic is prohibited, consumers are unlikely to select a product on the basis of that characteristic. Furthermore, the court gave no weight to historical evidence that a strength war existed at the time Section 205(e)(2) was enacted, focusing instead on perceived "changes in the malt beverage industry." Pet. App. 6a. Finally, the court misunderstood the significance of the evidence in the record concerning recent violations of the federal advertising and labeling restrictions in the malt-beverage industry.

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[14] The Tenth Circuit subsequently rejected the government's petition for rehearing and suggestion of rehearing en banc. Pet. App. 55a-56a.

Although the Tenth Circuit did not address whether Section 205(e)(2) satisfies the fourth part of the *Central Hudson* test, which inquires whether there is a "reasonable fit" between the legislative means and the legislative ends, the court expressed the belief that a reasonable fit is lacking because the labeling restriction in Section 205(e)(2) covers all types of malt beverages, whereas the threat of a strength war, in the court's view, exists only in the malt-liquor segment of the malt-beverage industry. That view cannot be reconciled with the district court's unchallenged holding that the evidence in the record supported the advertising restriction in Section 205(f)(2), which applies to all types of malt beverages. Nor can it be squared with evidence in the record that brewers of other types of beer, including Coors, have sought to compete on the basis of high alcohol content. More fundamentally, Congress could reasonably believe that a labeling restriction applicable to all types of malt beverages would be more effective in preventing strength wars than one applicable only to malt liquor.

II. Any doubt as to whether the labeling restriction in Section 205(e)(2) comports with the First Amendment should be resolved in favor of the statute's validity. The labeling restriction is entitled to an added presumption of validity, over and above the presumption of constitutionality normally accorded an Act of Congress, under two lines of cases. One line of cases recognizes that legislatures have broader latitude to regulate speech that promotes a socially harmful activity, such as alcohol consumption, which could be banned altogether, than they have to regulate other types of speech. See, *e.g.*, *Posadas de Puerto Rico Associates* v. *Tourism Co.*, 478 U.S. 328 (1986). The other line of cases holds that state laws regulating alcohol are entitled to an added presumption of validity when challenged on free speech grounds. See, *e.g.*, *California* v. *LaRue*, 409 U.S. 109 (1972). The labeling restriction in Section 205(e)(2) is entitled to the same presumption, because it was enacted to enforce the Twenty-first Amendment by facilitating the enforcement of state laws regulating alcohol.

When accorded that presumption, the labeling restriction plainly comports with the First Amendment.

ARGUMENT

THE STATUTORY PROHIBITION OF ALCOHOL-CONTENT STATEMENTS ON MALT-BEVERAGE LABELS IN 27 U.S.C. 205(e)(2) COMPORTS WITH THE FIRST AMENDMENT

The Tenth Circuit held that the portion of 27 U.S.C. 205(e)(2) that prohibits statements of alcohol content on the labels of malt-beverage containers violates the First Amendment. In so holding, the Tenth Circuit relied on this Court's *Central Hudson* test for reviewing regulations of commercial speech. As discussed in Point I below, the Tenth Circuit misapplied the *Central Hudson* test, and for that reason alone the judgment below should be reversed. Moreover, as discussed in Point II below, Section 205(e)(2) should be reviewed under a less stringent standard than is applied under the *Central Hudson* test. A less stringent standard of review is required under this Court's decisions concerning the regulation of speech that promotes socially harmful activities, such as alcohol consumption, and this Court's decisions concerning free speech challenges to state alcohol regulations. Those two lines of decisions require courts to accord greater deference than is accorded under the third and fourth parts of the *Central Hudson* test to legislative judgments regarding the existence of a harm for which a legislative remedy is required, the extent to which the challenged regulation alleviates that harm, and the fit between the legislative means chosen and the legislative objective to be achieved.

I. THE LABELING RESTRICTION SATISFIES THE *CENTRAL HUDSON* TEST FOR MEASURING THE VALIDITY OF GOVERNMENT REGULATION OF COMMERCIAL SPEECH

This Court in *Central Hudson* articulated a four-part test for reviewing First Amendment challenges to government regulation of commercial speech (447 U.S. at 566):

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

See *Ibanez* v. *Florida Department of Business & Professional Regulation*, 114 S. Ct. 2084, 2088-2089 (1994); *United States* v. *Edge Broadcasting Co.*, 113 S. Ct. 2696, 2703 (1993); *Edenfield* v. *Fane*, 113 S. Ct. 1792, 1798 (1993); *City of Cincinnati* v. *Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 (1993); *Board of Trustees* v. *Fox*, 492 U.S. 469, 475 (1989). The labeling restriction in Section 205(e)(2) satisfies the *Central Hudson* test. The Tenth Circuit's contrary holding rests on several legal errors.[15]

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[15] To the extent that the Tenth Circuit's holding rests on findings of fact, those findings are not entitled to deference in this Court. In a First Amendment challenge, an appellate court must "independently decide" whether the record supports the judgment below. See *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 463 (1978); see also, *e.g.*, *Rankin* v. *McPherson*, 483 U.S. 378, 385 n.8 (1987); *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 499-511 (1984); *Dunagin* v. *City of Oxford*, 718 F.2d 738, 748 n.8 (5th Cir. 1983) (en banc) (plurality opinion of Reavley, J.), cert. denied, 467 U.S. 1259 (1984); *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d 490, 497 (10th Cir. 1983), rev'd on other grounds *sub nom. Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984). Furthermore, to the extent that the Tenth Circuit disagreed with the congressional findings underlying Section 205(e)(2), Congress's findings, rather than the court's, are entitled to deference. See *Turner Broadcasting System, Inc.* v. *FCC*, No. 93-44 (June 27, 1994), slip op. 43; *Lockhart* v. *McCree*, 476 U.S. 162, 168 n.3 (1986); *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985).

A. The Labeling Restriction Advances A Substantial Governmental Interest

The first step in the *Central Hudson* inquiry relevant here [16] requires a court to "identify with care" the interests asserted by the government. *Edenfield*, 113 S. Ct. at 1798. The Tenth Circuit failed to use the requisite care in identifying the governmental interest underlying the labeling restriction in Section 205(e)(2).

1. The Tenth Circuit recognized that Congress's central goal in enacting the labeling restriction in Section 205(e)(2) was to curb strength wars among malt-beverage brewers. Pet. App. 4a. The court ignored, however, the further purpose of Congress to pursue that goal in a manner that would respect and facilitate, and not supplant, state regulation of alcohol pursuant to the Twenty-first Amendment.

It is clear from the text of the FAAA that Congress intended to facilitate state regulation of alcohol. One of the express purposes of the FAAA is "to enforce the twenty-first amendment," 27 U.S.C. 203; that Amend-

[16] As the first part of the *Central Hudson* test reflects, commercial speech must be truthful to qualify for even the "lesser protection" afforded to commercial speech by the First Amendment. *Edge Broadcasting*, 113 S. Ct. at 2703. Thus, "false, misleading, or deceptive commercial speech may be banned" without implicating the First Amendment. See, *e.g.*, *Ibanez*, 114 S. Ct. at 2088; *In re R.M.J.*, 455 U.S. 191, 202-203 (1982). The brief of amicus curiae Center for Science in the Public Interest (at 4-6) argues that the statements of alcohol content for which Coors sought certificates of label approval are inherently misleading, because they can mislead consumers into incorrectly believing that a serving of beer has less alcohol than a serving of other types of alcoholic beverages. That argument was not advanced by the government in the courts below. See 89-1203 Opening Br. for Defendants-Appellants 15; cf. 89-1203 C.A. Br. of Appellants, the Speaker and Bipartisan Leadership Group of the U.S. House of Representatives 26 n.16.

ment, in turn, "directly qualifies the federal commerce power," thereby enhancing state power over alcohol. *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 346 (1987). Other provisions of the FAAA reflect a similar intent to enhance state authority over alcohol. Section 203, for example, provides that the requirement to obtain a federal permit to produce and distribute most types of alcoholic beverages (see p. 3, *supra*) "shall not apply to any agency of a State or political subdivision thereof." 27 U.S.C. 203. In addition, Section 204 requires the Secretary to deny a permit to any person whose "operations [are] proposed to be conducted * * * in violation of the law of the State in which they are to be conducted." 27 U.S.C. 204(a)(2)(C). Furthermore, Section 204 conditions all permits "upon compliance * * * with the twenty-first amendment and laws relating to the enforcement thereof." 27 U.S.C. 204(d). Finally, and most relevant here, both the labeling provisions in Section 205(e)(2) and the advertising provisions in Section 205(f)(2) are expressly designed to operate in tandem with state laws on the same subject. See pp. 5-6, *supra*.[17]

Congress's purpose in the FAAA to facilitate the enforcement of state laws was the basis for one of the earliest decisions upholding the statute against a constitutional challenge. In *Arrow Distilleries, Inc.* v. *Alexander*, 109 F.2d 397, cert. denied, 310 U.S. 646 (1940), the Seventh Circuit upheld an order of the FAA suspending a liquor producer's permit because of its failure to obtain

[17] The legislative history of the FAAA confirms that Congress intended to enhance the ability of the States to enforce their own laws regulating alcohol. See 79 Cong. Rec. 11,714 (1935) (bill that became FAAA reflected Congress's belief that it "must do something to supplement legislation by the States to carry out their own policies") (remarks of Rep. Cullen); S. Rep. No. 1215, 74th Cong., 1st Sess. 3 (1935); H.R. Rep. No. 1542, 74th Cong., 1st Sess. 4 (1935); see also 79 Cong. Rec. 11,729-11,730 (remarks of Rep. Tarver), 11,788 (remarks of Rep. McCormack), 12,936 (1935) (remarks of Sen. George).

certificates of label approval and its misbranding of alcoholic beverages. The court rejected the contention that the Twenty-first Amendment deprived Congress of the authority to enact the FAAA. The court found nothing in the Amendment "to deny to Congress the power to legislate in aid of the state prohibitions [governing alcohol]." *Id.* at 400. On the contrary, the court determined that "[t]he twenty-first amendment authorizes Congress to take affirmative action to make effective the prohibition of the amendment against the importation or transportation of alcoholic beverages into states in violation of the laws thereof." *Id.* at 401. The court concluded that the FAAA is a valid exercise of that authority, because it "make[s] effective the protection which the twenty-first amendment gives to the states." *Ibid.* See also *Hanf* v. *United States*, 235 F.2d 710, 717 (8th Cir.) (Twenty-first Amendment imposed "an additional burden of enforcement" on the federal government, which FAAA was designed to shoulder), cert. denied, 352 U.S. 880 (1956); *Old Monastery Co.* v. *United States*, 147 F.2d 905, 907 (4th Cir.), cert. denied, 326 U.S. 734 (1945); *Hayes* v. *United States*, 112 F.2d 417, 422 (10th Cir. 1940).

The conclusion in *Arrow Distilleries* fully applies to the labeling restriction in Section 205(e)(2). As witnesses at the FACA Hearing in 1934 explained, state alcohol regulations at that time (as now) often included regulations that restrict the alcohol content of malt beverages. *FACA Hearing* 10-11, 38-39, 60, 62, 75-76; see also 79 Cong. Rec. 11,723 (1935) (remarks of Rep. Celler) (describing state laws limiting alcohol content of malt beverages). Those restrictions differed from State to State (and continue to do so, see J.A. 357-360). If a State imposes a restriction on alcohol content, the restriction reflects a judgment by that State regarding the maximum alcohol content appropriate for the health and welfare of its citizens. The labeling restriction in Section 205(e)(2), along with the advertising restriction in Section 205(f)(2), gives effect to such a judgment by an

individual State by making it less likely that a citizen from that State will travel to another State to purchase beer with a higher alcohol content. Cf. *South Dakota* v. *Dole*, 483 U.S. 203, 205-208 (1987).

2. In *Edge Broadcasting*, this Court reviewed a First Amendment challenge to a federal statute that, like the FAAA, was designed to complement state laws. *Edge Broadcasting* makes it clear that the Tenth Circuit misapplied the second part of the *Central Hudson* test and that that error undermined the Tenth Circuit's entire analysis.

At issue in *Edge Broadcasting* were the federal statutes (18 U.S.C. 1304 and 1307) that prohibit lottery advertising in States that do not operate lotteries, but permit lottery advertising in States that do operate lotteries. 113 S. Ct. at 2700-2701. The Fourth Circuit held that the statutes violated the First Amendment because, as applied to Edge Broadcasting, they "d[id] not directly advance the governmental interest asserted." *Edge Broadcasting Co.* v. *United States*, 5 F.3d 59, 62 (1992) (per curiam), rev'd, *United States* v. *Edge Broadcasting Co.*, *supra*. The Fourth Circuit based its holding on the fact that Edge Broadcasting's listeners in North Carolina, a State that does not operate a lottery, were "inundated" with lottery advertisements from neighboring Virginia, which does operate a lottery. *Ibid.* The Fourth Circuit decided that, with respect to that audience, the federal restriction provided only "ineffective or remote" support for "North Carolina's desire to discourage gambling." *Ibid.*

This Court reversed the Fourth Circuit's decision. *Edge Broadcasting*, 113 S. Ct. at 2704. The Court explained that the Fourth Circuit erred when it relied on the fact that the federal prohibition of lottery advertising operates only in nonlottery States to conclude that the prohibition provided only "remote" support for the goal of protecting the interests of nonlottery States, such as North Carolina. That fact, instead, reflected Congress's intent to further

the additional goal of protecting the interests of States, such as Virginia, that operate lotteries (*ibid.*):

> In response to the appearance of state-sponsored lotteries, Congress might have continued to ban all radio or television lottery advertisements, even by stations in States that have legalized lotteries. This it did not do. * * * Instead of favoring either the lottery or the nonlottery State, Congress opted to support the antigambling policy of a State like North Carolina * * *. At the same time it sought not to unduly interfere with the policy of a lottery sponsoring State such as Virginia. * * * This congressional policy of balancing the interests of lottery and nonlottery States is the substantial governmental interest that satisfies *Central Hudson*, the interest which the courts below did not fully appreciate.

Like the Fourth Circuit in *Edge Broadcasting*, the Tenth Circuit in this case did not fully appreciate Congress's goal of accommodating a matrix of state laws. Appreciation of that goal is essential to a proper analysis of the labeling restriction under *Central Hudson*. If Congress's sole purpose had been to curb strength wars among malt-beverage brewers, it might well have enacted a different statute. For example, Congress might have chosen to limit the alcohol content of malt beverages.[18] That limitation would have directly furthered the goal of preventing strength wars. But it would also have interfered with the State's authority to regulate alcoholic beverages (by devising their own limits on alcohol content or

[18] Congress might reasonably have concluded that it had authority to impose federal limits on alcohol content pursuant to its power to regulate interstate commerce. See *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 346-347 (1987); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 274-276 (1984); *Capital Cities Cable Inc.* v. *Crisp*, 467 U.S. 691, 714 (1984); *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980); *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-332 (1964).

choosing to impose no such limits) to a greater extent than does the labeling restriction.

In sum, *Edge Broadcasting* makes clear that a court must accurately identify the governmental interest underlying a restriction on commercial speech, as required under the second part of the *Central Hudson* test, before it can accurately determine whether the restriction directly advances the governmental interest, as required under the third part of the *Central Hudson* test. The Tenth Circuit's failure at the outset fully to identify the interests underlying the labeling restriction in Section 205(e)(2) undermined its subsequent analysis.

B. The Labeling Restriction Materially Advances The Asserted Governmental Interest

The third part of the *Central Hudson* test requires the government to show "that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Ibanez*, 114 S. Ct. at 2089, quoting *Edenfield*, 113 S. Ct. at 1800. The government made that showing here. It established that there is a continuing threat of strength wars among malt-beverage brewers and that the labeling restriction materially combats that threat.

1. *The Evidence Establishes A Continuing Threat Of Strength Wars Among Malt-Beverage Brewers*

The Tenth Circuit did not question the adequacy of the government's showing that there were strength wars among malt-beverage brewers when Section 205(e)(2) was enacted. Indeed, the court recognized that "the Act's legislative history * * * contains testimony 'that labels displaying alcohol content resulted in a strength war wherein producers competed for market share by putting increasing amounts of alcohol in their beer.'" Pet. App. 6a, quoting *id.* at 18a (first court of appeals opinion). Coors did not present any evidence rebutting the evidence

before Congress proving the existence of a strength war. Thus, it is undisputed that the harm at which the labeling restriction in Section 205(e)(2) is aimed was "real" (*Edenfield*, 113 S. Ct. at 1800) at the time of its enactment.

It is also undisputed that there continues to be a threat of strength wars in the malt-beverage industry. As the court of appeals observed, the government presented evidence (1) "that malt beverage manufacturers already are competing and advertising on the basis of alcohol strength in the malt-liquor segment of the market"; (2) "that consumers who prefer malt liquor do so primarily because of its higher alcohol content"; and (3) "that a number of manufacturers have tried to advertise malt liquor * * * to tout its alcohol strength." Pet. App. 7a. The court noted, moreover, that "Coors does not contest * * * the existence of such a threat." *Ibid.*[19]

2. *The Labeling Restriction Combats The Risk Of Strength Wars In A Direct And Material Way*

Although the Tenth Circuit did not doubt that there is a continuing threat of strength wars, it determined that "the Government has offered no evidence to indicate that the appearance of factual statements of alcohol content on malt-beverage labels would lead to strength wars or that their continued prohibition helps to prevent strength wars." Pet. App. 9a. That determination is flawed in three respects.

a. First, the Tenth Circuit erred by failing to discern any link between the advertising of a product characteristic (in this case, high alcohol content) and the extent to which consumers choose the product on the basis of that characteristic. Pet. App. 21a. This Court has recognized as a matter of common sense that a restriction on the advertising of a product decreases demand for the product. See *Edge Broadcasting*, 113 S. Ct. at 2707; *Posadas de Puerto Rico Associates* v. *Tourism Co.*, 478 U.S. 328, 342 (1986); *Central Hudson*, 447 U.S. at 569. It follows that a restriction on the advertising of a product characteristic will decrease the extent to which consumers select the product on the basis of that characteristic. The Tenth Circuit accordingly erred in failing to hold that the labeling restriction directly advances Congress's goal of ensuring that "[m]alt beverages should not be sold on the basis of alcoholic content." H.R. Rep. No. 1542, 74th Cong., 1st Sess. 12 (1935).[20]

[19] The parties disagree over the scope of the current threat of strength wars in the malt-beverage industry. Coors has contended that the threat exists only in the malt-liquor segment of the industry. The government has contended that the threat is not so limited. Because this issue implicates the question whether Section 205(e)(2) is overly broad insofar as it applies to all malt-beverage labeling, we address it in our discussion of the fourth part of the *Central Hudson* test. See pp. 34-37, *infra*.

[20] In a related context, this Court has recognized that people cross state lines to purchase beer at lower prices. See *Healy* v. *The Beer Inst.*, 491 U.S. 324, 326 (1989); *Falls City Indus., Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428, 437 & n.8 (1983). It is just such behavior, which reflects the close connection between consumer purchasing decisions and product information, that has led the lower federal courts and the state courts to uphold, against First Amendment challenges, state restrictions on price advertising of alcoholic beverages. See *Queensgate Investment Co.* v. *Liquor Control Comm'n*, 433 N.E.2d 138 (Ohio) (per curiam), appeal dismissed for want of a substantial federal question, 459 U.S. 807 (1982), cited with approval in *Edge Broadcasting*, 113 S. Ct. at 2707; *S & S Liquor Mart, Inc.* v. *Pastore*, 497 A.2d 729 (R.I. 1985); *Rhode Island Liquor Stores Ass'n* v. *Evening Call Pub. Co.*, 497 A.2d 331 (R.I. 1985). "Common sense tells us that a lifting of the ban on price advertising will lead to a more competitive market." *44 Liquor Mart, Inc.* v. *Racine*, 829 F. Supp. 543, 554 (D.R.I. 1993), aff'd in part, rev'd in part *sub nom. 44 Liquormart, Inc.* v. *Rhode Island*, Nos. 93-1893 & 93-1927 (May 2, 1994), opinion withdrawn and judgment vacated, aff'd in part, rev'd in part mem. (1st Cir. July 8, 1994); see *S & S Liquor Mart*, 497 A.2d at 735. Part of the reason such restrictions reduce the consumption of alcohol, of course, is that they prevent alcohol vendors from engaging in price competition. Just as alcohol price adver-

b. Second, the court ignored the historical evidence upon which the labeling restriction in Section 205(e)(2) was based. Cf., *e.g.*, *Burson* v. *Freeman*, 112 S. Ct. 1846, 1856 (1992) (plurality opinion) (examining history of statute challenged on First Amendment grounds). The court recognized that the evidence before Congress when it enacted Section 205(e)(2) showed (1) "that labels displaying alcohol content resulted in a strength war"; and (2) "that not disclosing the alcohol content on malt beverages would relieve marketplace pressures to produce beer on the basis of alcohol content," and would thereby "result[] over the long term in beers with a lower alcohol content." Pet. App. 6a. Thus, the evidence clearly supported Congress's determination, at the time of Section 205(e)(2)'s enactment, that the disclosure of alcohol content had led to strength wars and that the prohibition of alcohol-content statements would prevent them. Those determinations by Congress are entitled to "substantial deference." *Turner Broadcasting System, Inc.* v. *FCC*, No. 93-44 (June 27, 1994), slip op. 42.[21]

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tising restrictions prevent "price wars," so too do alcohol-content advertising restrictions prevent "strength wars." Cf. *Capital Broadcasting Co.* v. *Mitchell*, 333 F. Supp. 582 (D.D.C. 1971) (upholding against First Amendment challenge ban on broadcast of cigarette advertising), aff'd mem., 405 U.S. 1000 (1972); *Dunagin* v. *City of Oxford, supra* (upholding against First Amendment challenge prohibition of most forms of alcohol sign advertising), cited with approval in *Posadas*, 478 U.S. at 347 n.10; *Oklahoma Telecasters Ass'n* v. *Crisp, supra* (rejecting First Amendment challenge to prohibition of all alcohol advertising except for one storefront sign); *Princess Sea Indus., Inc.* v. *State*, 635 P.2d 281 (Nev. 1981) (upholding against First Amendment challenge restrictions on brothel advertising), cert. denied, 456 U.S. 926 (1982).

[21] The court of appeals appeared to believe that its disregard of the historical evidence was justified by *Edenfield*, which it read as adopting a "much stricter" standard for applying the third part of the *Central Hudson* test than this Court had applied in earlier

The Tenth Circuit ignored the historical evidence underlying the labeling restriction because of what it perceived to be "changes in the malt beverage industry and market since 1935." Pet. App. 6a; see also *id.* at 48a-50a (first district court opinion). In particular, the court believed that the evidence showed that "the vast majority of consumers in the United States value taste and lower calories—both of which are adversely affected by increased alcohol strength." *Id.* at 8a. Based on that evidence, the Tenth Circuit found it unlikely that permitting statements of alcohol content on labels would lead to strength wars. *Id.* at 9a.

The Tenth Circuit erred in relying on evidence that most beer consumers currently value taste and lower calories, qualities that, Coors asserted, would be adversely affected by increased alcohol strength. The history of the FAAA shows that at the time the labeling restriction was enacted, many consumers preferred high alcohol beer. Even if we assume that the majority preference has changed since that time, it can change again in the future.[22] The validity of an Act of Congress should not depend upon such cyclical shifts in consumption patterns. Cf. *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 71 (1983) (insufficiency of original motivation for restriction on commercial speech does not invalidate restriction if it continues to advance other legitimate purposes); *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 460

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decisions. Pet. App. 5a. *Edenfield*, however, did not purport to heighten the showing required under the third part of the *Central Hudson* test, and the subsequent decision in *Edge Broadcasting* confirms that the third part of the *Central Hudson* test remains the same. 113 S. Ct. at 2704.

[22] See J.A. 256 (testimony of Coors official, stating: "Our reason for being in business * * * is to meet consumer demand for a particular product. And *right now*, the consumer demand is for lighter and lower alcohol beer.") (emphasis added).

(1978) (same).[23] Moreover, the Tenth Circuit's reliance on the current preference of consumers for taste and lower calories ignores the role that the advertising and labeling restrictions have played in promoting those preferences, as distinguished from a preference based on alcohol content. There accordingly is every reason to expect that consumer preferences might change if respondent and other brewers were free to market malt beverages on the basis of their alcohol content. See Center for Science in the Public Interest Amicus Br. 15-17 (discussing current popularity of "ice" beer because of labels displaying its enhanced alcohol content).

In any event, the government showed that the current demand for high alcohol beer is large enough to pose a threat of strength wars. It showed that people who drink malt liquor choose it because of its high alcohol content, and that malt liquor is marketed on the basis of its high alcohol content. See p. 14, *supra*. Although the evidence indicated that malt liquor presently accounts for only 3% of the malt-beverage market, the evidence of the strong competition in that segment of the market also established that brewers consider it sufficiently large to warrant efforts to dominate it. See, *e.g.*, J.A. 213, 244, 347; Deposition of Lutz E. Issleib 54-55, 58, 64-65; see also J.A. 157-158 (describing market in U.K. for high alcohol content beer). The evidence also showed that brewers would increase the alcohol content of their malt liquors if their competitors did so. See, *e.g.*, Deposition of Lutz E. Issleib 66 (statement of chairman and chief executive of Pabst Brewing Company that "I play follow the leader,"

[23] Congress is in a better position than the courts to determine whether changed conditions warrant amendment or repeal of legislation. *Turner*, *supra*, slip op. 42. Significantly, Congress has on several occasions declined to enact bills to repeal the labeling restriction in Section 205(e)(2). See S. 2595, 99th Cong., 2d Sess. (1986); H.R. 1420, 103d Cong., 1st Sess. (1993).

and that his company would keep up with the competition in the area of alcohol content).[24]

c. Finally, the Tenth Circuit improperly analyzed the evidence concerning recent violations of the labeling and advertising restrictions. That evidence showed, among other things, that malt-liquor manufacturers have violated the labeling and advertising restrictions of the FAAA by using "descriptive terms such as 'power,' 'strong character,' [and] 'dynamite[]' * * * to tout * * * alcohol strength." Pet. App. 7a. The Tenth Circuit thought it significant that the evidence primarily concerned the malt-liquor segment of the malt-beverage industry, and that violations in that segment of the market have primarily involved "descriptive," as distinguished from numerical, statements of alcohol content. *Id.* at 7a-8a & n.5. The court thus suggested that the government's interest in preventing strength wars could be adequately served by a labeling restriction that applies only to malt liquor, and not other types of malt beverages, and that prohibits only descriptive, and not numerical, statements of alcohol content.

i. The Tenth Circuit erred, in striking down the restriction under the third part of the *Central Hudson* test, by relying on its view that the labeling restriction could be more narrowly tailored. The question whether a statute is "more extensive than necessary" is relevant to the fourth, not the third, part of the test. *Fox*, 492 U.S. at 475-481. The court of appeals' error is significant because under the fourth part of the *Central Hudson* test, courts are required to accord substantial deference to Congress's judgment regarding the "fit" between the legis-

[24] The evidence of continuing marketplace pressure upon brewers to compete on the basis of high alcohol content was not limited to the malt-liquor segment of the industry. As discussed above, the evidence showed that Coors distributed wallet cards disclosing the alcohol content of its beer and that of its competitors. See p. 14, *supra*.

lative means and the legislative ends. *Id.* at 479-481; see *Edge Broadcasting*, 113 S. Ct. at 2707; *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 539 (1987); *Posadas*, 478 U.S. at 341-342; *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 509 (1981). The Tenth Circuit, however, accorded no deference to Congress's judgment regarding the proper scope of the labeling restriction.

ii. Furthermore, the Tenth Circuit failed to explain why the government's evidence was not sufficient to sustain the *labeling* restriction in Section 205(e)(2), while the same evidence was held sufficient, in a ruling by the district court that respondent did not challenge on appeal, to sustain the *advertising* restriction in Section 205 (f)(2). There is nothing in law or logic to support the conclusion that the same evidence that sustained the advertising restriction in Section 205(f)(2) does not also sustain the labeling restriction in Section 205(e)(2). See *Kordel* v. *United States*, 335 U.S. 345, 351 (1948) ("Every labeling is in a sense an advertisement."); see also *Halter* v. *Nebraska*, 205 U.S. 34 (1907).

The district court attempted to justify upholding the advertising restriction while striking down the labeling restriction on the ground that the labeling restriction does not add much to what is accomplished by the advertising restriction. Pet. App. 37a-38a. In *Edge Broadcasting*, however, this Court condemned similar reasoning as "represent[ing] too limited a view of what amounts to direct advancement of the governmental interest," 113 S. Ct. at 2706, and failing to allow adequate "room for legislative judgments," *id.* at 2707.[25] The advertising and

[25] The Court in *Edge Broadcasting* rejected a radio station's contention that the federal statutes that prohibit lottery advertising do not directly advance the government's goal of decreasing gambling in States that do not operate lotteries, because the statutes only modestly decreased the amount of lottery advertising to which people who listened to the radio station were exposed. *Edge Broadcasting*, 113 S. Ct. at 2706-2707. Coors advanced a similar contention here: namely, that Section 205(e)(2) does not directly advance the government's goal of preventing strength wars, because it only modestly decreases the extent to which beer can be marketed based on its high alcohol content, in light of the other labeling and advertising restrictions on statements of alcohol content that Coors does not challenge. Under *Edge Broadcasting*, Coors' contention should be rejected.

labeling restrictions at issue here operate in tandem and are mutually reinforcing. The court of appeals therefore erred in excising the labeling component of the integrated regulatory scheme.

iii. Finally, the Tenth Circuit misunderstood the significance of the fact that most recent violations of the advertising and labeling restrictions have involved descriptive, rather than numerical, statements of alcohol content. See Pet. App. 7a-8a. That fact signifies only that malt-beverage brewers cannot circumvent the restrictions on numerical statements as easily as they can the restrictions on descriptive statements. By the same token, it is easier to ascertain a violation of the numerical-statement restriction than to ascertain a violation of the descriptive-statement restriction, because the latter determination may require consideration of the connotations of a descriptive term and the context in which the term is used. See J.A. 102. Thus, the fact that the restriction on numerical statements is easier to enforce (and, from all that appears in the record, more consistently complied with) supports, rather than undermines, the validity of the restriction.[26]

[26] The Tenth Circuit also erred in stating that there is no evidence from other countries to support the effectiveness of the labeling restriction in preventing strength wars. Pet. App. 8a. In fact, there is evidence in the record concerning Canada and Britain, where disclosure of alcohol content is permitted, suggesting that the labeling ban has the effect of preventing strength wars. The record establishes that: (1) there has been a trend toward consumption of higher alcohol content beverages in the United Kingdom since the advent of alcohol-content labeling (J.A. 180-181, 189); (2) respondent's own beer has a higher alcohol level

C. The Labeling Restriction Is Narrowly Tailored To Advance The Government's Substantial Interest

The fourth part of the *Central Hudson* test asks whether the government's restriction is narrowly tailored to advance the government's asserted interest. *Fox*, 492 U.S. at 480; *Central Hudson*, 447 U.S. at 565. It "require[s] a fit between the restriction and the government interest that is not necessarily perfect, but reasonable." *Edge Broadcasting*, 113 S. Ct. at 2705. There is a reasonable fit between the labeling restriction in Section 205(e)(2) and Congress's goal of combatting strength wars in a manner consistent with state alcohol regulation. The labeling restriction does not prohibit the advertising of malt beverages; rather, it prohibits only the advertising of a single product characteristic. Moreover, the labeling restriction does not altogether prohibit the disclosure of the alcohol content of malt beverages; it prohibits only the use of that information in labeling and other forms of advertising, and thus allows brewers or the media to supply alcohol-content information outside of the advertising context. J.A. 214-215, 260; cf. *Ohralik*, 436 U.S. at 458 (attorney disciplinary rule before the Court "does not prohibit a lawyer from giving unsolicited legal advice; it proscribes the acceptance of employment resulting from such advice"). Thus, the scope of the labeling restriction "is 'in proportion to the interest served.'" *Fox*, 492 U.S. at 480, quoting *In re R.M.J.*, 455 U.S. at 203.

1. Although the Tenth Circuit did not consider the labeling restriction in Section 205(e)(2) under the fourth part of the *Central Hudson* test, it suggested that a "reasonable fit" is lacking because the labeling restriction applies to all types of malt beverages, whereas the evidence of a continuing threat of strength wars primarily

in Canada, where the alcohol content of malt beverages is shown on the label (J.A. 278-279); and (3) the light beer market is smaller in Canada than in the United States (J.A. 279-280).

concerned one type of malt beverage: malt liquor. Pet. App. 7a, 9a n.6.[27]

Congress could reasonably have believed that a labeling restriction applicable to all types of malt beverages would be more effective than one applicable only to malt liquor. Congress's concern was not about a particular type of beer; its concern was about a particular type of beer-*drinker*: a person who, in the absence of a prohibition on the disclosure of alcohol content, would choose a beer based on its high alcohol strength. A labeling restriction applicable to all types of malt beverages more effectively prevents those people from choosing a malt beverage based on high alcohol content than would a restriction applicable only to malt liquor. First, a labeling restriction applicable to all malt beverages would generally prevent consumers from knowing with certainty even that malt liquors, as a category, have higher alcohol content than other types of malt beverages. J.A. 267 (testimony of Coors official that "there are a percent of consumers who do not currently know that certain categories of beer have more or less alcohol"). In addition, such a labeling restriction would prevent consumers from choosing among brands of *any* type of malt beverage (not just among brands of malt liquor) on the basis of their high alcohol content.[28]

[27] Although the Tenth Circuit found it unnecessary to decide whether the labeling restriction satisfies the fourth part of the *Central Hudson* test, the issue was fully briefed and argued in both courts below and was raised in the government's certiorari petition. Defendants' Tr. Br. (CR 46), at 69-76; II Trial Tr. 287-293; Pet. 21-23. It is therefore properly before this Court. See, *e.g.*, *United States* v. *Williams*, 112 S. Ct. 1735, 1738-1739 (1992).

[28] The same reasoning justifies Congress's enactment of an advertising restriction that, like the labeling restriction, applies to all types of malt beverages. As discussed above, however, neither court below explained why the labeling restriction should be struck down, even though the advertising restriction was upheld. See pp. 32-33, *supra*.

The differing effects of a labeling restriction applicable to all types of malt beverages and one applicable only to malt liquor can be illustrated by considering people who have just reached legal drinking age. Those young people, like many alcohol consumers at the end of Prohibition, may wish to choose a beer based on its high alcohol content. The young drinkers may not know that malt liquor is the type of beer with the highest alcohol content. They would readily be able to figure that out, however, if the disclosure of alcohol content were prohibited only with respect to beers the alcohol content of which exceeded a certain level.[29]

Furthermore, the government presented evidence at trial showing that the problem of strength wars is not limited to the malt-liquor segment of the market. For example, the government showed that Coors produced Coors Extra Gold, a higher alcohol beer, to increase its share of the market, and that Coors' goal in bringing this litigation is to correct the "consumer misperception" that its beer has less alcohol than the competing brands. J.A. 251-253, 275-277, 342. That is precisely the type of behavior—*i.e.*, increasing the alcohol content of beer in order to increase one's share of the market, or emphasizing that one's product has as much alcohol as the competition—that Section 205(e)(2) is designed to discourage. The court of appeals itself acknowledged the force of this point on the prior appeal, observing that "Coors' admission at oral argument that it desires to publish the alcohol content of its products to dispel Coors' image of being a 'weak' beer testifies to the viability of the government's interest." Pet. App. 20a.[30]

[29] For example, if the disclosure of alcohol content were prohibited with respect to beer that contained more than 5% alcohol by volume but were required for beer that contained 5% or less alcohol, a consumer could safely conclude that beer that was not labeled according to its alcohol content contained more than 5% alcohol.

[30] Cf. *Posadas*, 478 U.S. at 341-342 ("The Puerto Rico Legislature obviously believed * * * that advertising of casino gambling

2. The fit between the labeling restriction and the goal of preventing strength wars cannot be challenged on the ground that the restriction prevents people from choosing beer on the basis of its *low* alcohol content. ATF has construed Section 205(e)(2) to permit brewers to label and advertise their beers as "reduced alcohol" and "low alcohol." 54 Fed. Reg. 3591, 3594 (1989) (adding 27 C.F.R. 7.26(b)-(d)). That construction of Section 205 (e)(2) permits consumers who wish to limit their alcohol content to do so effectively, without providing particularly useful information to consumers who wish to select a beer based on its high alcohol content.

3. Nor can the labeling restriction be challenged on the ground that strength wars could be combated just as effectively by requiring labeling that discloses the risks of alcohol abuse. As this Court explained in a similar context, "it is up to the legislature to decide whether or not such a 'counterspeech' policy would be as effective" as the labeling restriction. *Posadas*, 478 U.S. at 344. Congress has in fact required health warnings on the labels of most alcoholic-beverage containers. 27 U.S.C. 213 *et seq.* The fourth part of the *Central Hudson* test does not force Congress to choose between the two methods of regulation. See *Dunagin*, 718 F.2d at 751 & n.9.

II. THE LABELING RESTRICTION IS ENTITLED TO AN ADDED PRESUMPTION OF VALIDITY

Any doubt as to whether the labeling restriction comports with the First Amendment should be resolved in favor of its validity. A presumption of validity, over and above the presumption of constitutionality normally ac-

* * * would serve to increase the demand for the product advertised * * * and the fact that appellant has chosen to litigate this case all the way to this Court indicates that appellant shares the legislature's view."); *Central Hudson*, 447 U.S. at 569 ("There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales.").

corded an Act of Congress, is warranted here for two reasons. First, this Court and other courts have recognized that legislatures have broader latitude to regulate speech that promotes socially harmful activities, such as alcohol consumption, than they have to regulate other types of speech. See, *e.g.*, *Posadas, supra*. Moreover, this Court has consistently held that state laws regulating alcohol are entitled, by virtue of the Twenty-first Amendment, to an "added presumption" of validity when challenged on free speech grounds. *California* v. *LaRue*, 409 U.S. 109, 118 (1972). The federal labeling restriction is also entitled to that presumption, because it was enacted to enforce the Twenty-first Amendment by facilitating the enforcement of state laws regulating alcohol.

A. The Labeling Restriction Is Entitled To An Added Presumption Of Validity Because It Regulates Speech Promoting A Socially Harmful Activity

"Legislative regulation of products or activities deemed harmful, such as cigarettes, alcoholic beverages, and prostitution, has varied from outright prohibition on the one hand, to legalization of the product or activity with restrictions on stimulation of its demand on the other hand." *Posadas*, 478 U.S. at 346 (citation omitted). The Nation's experience with Prohibition, mandated by the Eighteenth Amendment, demonstrated that an outright ban on alcohol consumption led to harms, such as the growth of organized crime and widespread disregard of the law, that were equal to or greater than the harms caused by the banned activity.[31] That experience was fresh in Congress's mind when it enacted the labeling restriction in Section 205(e)(2). See S. Rep. No. 1215,

[31] See 76 Cong. Rec. 8 (remarks of Rep. Sabath), 16 (remarks of Rep. McKeown), 27 (1932) (remarks of Rep. Horr); 76 Cong. Rec. 4148 (remarks of Sen. Wagner), 4226 (1933) (remarks of Sen. Tydings). See generally Spaeth, *The Twenty-First Amendment and State Control Over Intoxicating Liquor: Accommodating the Federal Interest*, 79 Calif. L. Rev. 161, 162, 176-180 (1991).

supra, at 3; H.R. Rep. No. 1542, *supra*, at 2; see also, *e.g.*, 79 Cong. Rec. 12,936 (remarks of Sen. George), 12,943 (1935) (remarks of Sen. Copeland). Especially in light of the Prohibition experience, the labeling restriction represents a reasonable restriction on the promotion of an activity that Congress has reasonably deemed harmful.

This Court and other courts have repeatedly upheld reasonable restrictions on the advertising of activities that society deems harmful but has chosen for various reasons to tolerate. See *Edge Broadcasting*, 113 S. Ct. at 2700 (lotteries); *Posadas*, 478 U.S. at 344-347 (casino gambling); *Queensgate Investment Co.* v. *Liquor Control Comm'n*, 433 N.E.2d 138 (Ohio) (per curiam) (liquor price advertising), appeal dismissed for want of a substantial federal question, 459 U.S. 807 (1982); *Capital Broadcasting Co.* v. *Mitchell*, 333 F. Supp. 582 (D.D.C. 1971) (broadcast cigarette advertising), aff'd mem., 405 U.S. 1000 (1972); *Dunagin* v. *City of Oxford*, 718 F.2d 738 (5th Cir. 1983) (en banc) (signs advertising liquor), cert. denied, 467 U.S. 1259 (1984); *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d 490 (10th Cir. 1983) (prohibition of all alcohol advertising except for one storefront sign), rev'd on other grounds *sub nom. Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984); *S & S Liquor Mart Inc.* v. *Pastore*, 497 A.2d 729 (R.I. 1985) (alcohol price advertising); *Rhode Island Liquor Stores Ass'n* v. *Evening Call Pub. Co.*, 497 A.2d 331 (R.I. 1985) (same); *Princess Sea Indus., Inc.* v. *State*, 635 P.2d 281 (Nev. 1981) (brothel advertising), cert. denied, 456 U.S. 926 (1982). These decisions indicate that legislatures are entitled to especially broad latitude in regulating speech that promotes activities that the legislatures reasonably determine give rise to especially great social harms.

Greater deference to legislative judgment with regard to socially harmful activities is justified by the rationale underlying this Court's commercial speech doctrine. As

a general matter, commercial speech enjoys only "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values." *Fox*, 492 U.S. at 477 (quoting *Ohralik*, 436 U.S. at 456); see *Edge Broadcasting*, 113 S. Ct. at 2703; *Central Hudson*, 447 U.S. at 563. That is because commercial speech "is 'linked inextricably' with the commercial arrangement that it proposes," *Edenfield*, 113 S. Ct. at 1798 (quoting *Friedman* v. *Rogers*, 440 U.S. 1, 10 n.9 (1979)), and commercial activity is "an area traditionally subject to government regulation," *Edge Broadcasting*, 113 S. Ct. at 2703 (quoting *Ohralik*, 436 U.S. at 456). The government's greater interest in, and authority over, regulation of commercial activity gives it greater interest in, and authority over, regulation of "the expression itself," *Edenfield*, 113 S. Ct. at 1798, than it has with respect to other forms of expression.

Certain commercial activities, such as gambling and the sale of alcoholic beverages, have traditionally been considered to pose particularly great risks of social harm. See, *e.g.*, *Posadas*, 478 U.S. at 341 (casino gambling); *Stone* v. *Mississippi*, 101 U.S. 814, 818 (1880) (lotteries); Alcoholic Beverage Labeling Act of 1988, Pub. L. No. 100-690, Tit. VIII, § 8001(a)(3), 102 Stat. 4518, 4519 (codified at 27 U.S.C. 213, 215) (congressional findings regarding harms of alcohol consumption and abuse). Such activities accordingly have long been subject to particularly close regulation by the States and the federal government. See *Edge Broadcasting*, 113 S. Ct. at 2700-2701 (history of lottery regulation); *Craig* v. *Boren*, 429 U.S. 190, 205-206 & nn.18-19 (1976) (history of alcohol regulation). Indeed, the States plainly have authority under the Twenty-first Amendment to impose an outright ban on alcohol sales and consumption within their borders. See, *e.g.*, *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). Similarly, the federal government's authority to regulate alcohol under the Commerce Clause is

broad. See, *e.g.*, *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 346-347 (1987); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 274-276 (1984); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 712-713 (1984); *California Retail Liquor Dealers Ass'n*, 445 U.S. at 108-110; *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-332 (1964).

The particularly strong governmental interest in regulating activities such as alcohol consumption gives rise to a concomitantly strong interest in regulating speech promoting those activities. Cf. *Edenfield*, 113 S. Ct. at 1798; *Posadas*, 478 U.S. at 345-347. By the same token, because such speech is "linked inextricably" (*Edenfield*, 113 S. Ct. at 1798) to a socially harmful activity, it warrants even less protection under the First Amendment than other forms of commercial speech. Thus, the balance of interests tips more sharply in favor of upholding a regulation of speech in this area than in other areas of commercial activity. For that reason alone, any doubt as to whether the labeling restriction in Section 205(e)(2) satisfies the *Central Hudson* test for regulations of commercial speech must be resolved in favor of upholding the restriction.

B. The Labeling Restriction Is Entitled To An Added Presumption Of Validity Because It Facilitates The Enforcement Of State Laws Within The Ambit Of The Twenty-first Amendment

The labeling restriction respondent challenges is, however, supported by more than general principles of First Amendment law concerning prohibitions against the promotion of socially harmful conduct. Here, there is affirmative support elsewhere in the Constitution itself—in the subsequently ratified Twenty-first Amendment—for the labeling restriction. In light of the Twenty-first Amendment, this Court held in *California* v. *LaRue*, 409 U.S. 109 (1972), that state laws regulating alcohol are entitled to an "added presumption in favor of * * * valid-

ity" when challenged under the Speech Clause of the First Amendment. *Id.* at 118. The federal labeling restriction is also entitled to such an added presumption; and, when accorded that presumption, it plainly comports with the First Amendment.

1. The Court in *LaRue* rejected a free speech challenge to state regulations that banned nude dancing and similar conduct in bars and nightclubs. See 409 U.S. at 111-112. The Court "d[id] not disagree" with the lower court's determination that the regulations, on their face, proscribed speech entitled to First Amendment protection. *Id.* at 116. But the Court "d[id] not believe," as the lower court had, that the regulations should be reviewed under the standard announced in *United States* v. *O'Brien*, 391 U.S. 367 (1968). *LaRue*, 409 U.S. at 116. Instead, the Court adopted a less stringent standard of review.

The Court in *LaRue* adopted a less stringent standard of First Amendment review because the regulations before it were within the ambit of the Twenty-first Amendment. The Court determined that "the broad sweep" of the latter Amendment "requires" that state laws regulating alcohol be accorded an "added presumption in favor of * * * validity." 409 U.S. at 114, 118-119. The Court explained that, while the States "require no specific grant of authority in the Federal Constitution" to regulate alcohol (since such regulation falls within their police power), "the case for upholding state regulation in the area covered by the Twenty-first Amendment is undoubtedly strengthened by that enactment." *Id.* at 114-115.

The *LaRue* Court upheld the challenged regulations under the standard of review required in light of the Twenty-first Amendment. The Court observed that the regulations were based on the State's conclusion that "the sale of liquor by the drink and lewd or naked dancing and entertainment should not take place in bars and cocktail lounges." 409 U.S. at 115. In the Court's view, that conclusion was "not * * * an irrational one." *Id.* at 116.

The Court also rejected the argument that the regulations were over-inclusive. It determined that "[n]othing in the record * * * or in common experience compel[led] the conclusion" that more narrowly tailored regulations would have been equally effective. *Ibid.* The Court accordingly held that the State's "choice" of legislative means "cannot * * * be deemed an unreasonable one under the holdings of our prior cases." *Ibid.*, citing *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 487-488 (1955).

LaRue makes it clear that this Court reviews free speech challenges to state alcohol regulations under a less stringent standard than applied under *Central Hudson*. *Dunagin*, 718 F.2d at 745 ("The test applied in *LaRue* * * * is less strict than that applied in *Central Hudson Gas*.").[32] The third part of the *Central Hudson* test requires a State to show "that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Ibanez*, 114 S. Ct. at 2089. By contrast, *LaRue* requires only that the State's judgment as to the existence of a harm and the effectiveness of the challenged regulation in preventing that harm be "not * * * irrational." 409 U.S. at 116. The fourth part of the *Central Hudson* test requires a court to determine whether the State has chosen "means narrowly tailored to achieve the desired objective." *Fox*, 492 U.S. at 480. By comparison, *LaRue* requires the court to uphold the legislative means as not "unreasonable" unless the record or common experience "compels" a contrary conclusion.

[32] Although the Court has declined to extend *LaRue* beyond the free speech context, see *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5 (1982) (dictum); *Craig* v. *Boren*, 429 U.S. 190, 207-208 (1976), it has repeatedly applied *LaRue* in that context, including in decisions subsequent to *Central Hudson*. See *City of Newport* v. *Iacobucci*, 479 U.S. 92, 95 (1986) (per curiam); *New York State Liquor Authority* v. *Bellanca*, 452 U.S. 714 (1981) (per curiam); *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 932-933 (1975); see also *Dunagin*, 718 F.2d at 745 (finding it "[n]otabl[e]" that *Bellanca* was decided after *Central Hudson Gas* and *Craig* v. *Boren*").

409 U.S. at 116 (citing *Williamson* v. *Lee Optical Co.*, *supra*).

2. Section 205(e)(2) should be reviewed under the *LaRue* standard, even though it is a federal, rather than a state, provision. As explained above (pp. 3, 20-23, *supra*), Congress enacted the FAAA, of which Section 205(e)(2) is a part, expressly for the purpose of enforcing the Twenty-first Amendment. 27 U.S.C. 203; see also 79 Cong. Rec. 11,713-11,714 (1935) (remarks of Rep. Cullen). Moreover, Congress designed Section 205(e)(2) to operate in tandem with state laws regulating alcohol and facilitate their enforcement. Accordingly, the principles of *LaRue* are fully applicable here. To conclude otherwise would mean that a state law could be upheld while a federal law necessary to the effective enforcement of the state law could be invalidated.[33]

There is no basis in the text or history of the Twenty-first Amendment for such a dual standard. On the contrary, the significant authority over alcohol conferred by "the broad sweep of the Twenty-first Amendment" (*LaRue*, 409 U.S. at 114) is not limited to the States. The Amendment also applies to "Territor[ies]" and "possession[s]" of the United States, which are governed by federal law. See U.S. Const. Art. IV, § 3. Moreover, the Twenty-first Amendment was based on earlier pre-Prohibition federal statutes that were designed to assist state regulation of alcohol.[34] Finally, in proposing the

[33] Because the labeling restriction in Section 205(e)(2) may be overridden by a State, this Court need not decide whether *LaRue* would apply to a federal provision in a case involving "conflicting state and federal efforts to regulate * * * liquor." *Capital Cities*, 467 U.S. at 713.

[34] The Webb-Kenyon Act, ch. 90, 37 Stat. 699 (1913) (codified at 27 U.S.C. 122), prohibited the shipment in interstate commerce of liquor intended to be received, possessed, sold, or in any manner used in violation of the law of the State into which it was shipped. The Reed Amendment, ch. 162, § 5, 39 Stat. 1069 (1917), made violations of the Webb-Kenyon Act a federal crime. See also 18 U.S.C. 1262 (making it a federal crime to transport any intoxicating liquor into a State that prohibits sale of beverages containing more than 4% alcohol by volume). See generally de Ganahl, *The Scope of Federal Power Over Alcoholic Beverages Since the Twenty-first Amendment*, 8 Geo. Wash. L. Rev. 819, 822-823 (1940); Lydick, *State Control of Liquor Advertising Under the United States Constitution*, 12 Baylor L. Rev. 43, 47-48 (1960); Spaeth, *supra*, 79 Calif. L. Rev. at 181-182.

Twenty-first Amendment to the States, Congress understood that such federal legislation would be necessary to make the authority conferred on the States by the Amendment fully effective. See, *e.g.*, 76 Cong. Rec. 26 (remarks of Rep. Horr), 791 (1932) (remarks of Rep. Blanton); 76 Cong. Rec. 2776 (remarks of Rep. Lea), 4168 (remarks of Sen. Fess), 4172 (remarks of Sen. Borah), 4221 (1933) (remarks of Sen. Barkley).[35] The long history

[35] Courts and commentators writing shortly after the ratification of the Twenty-first Amendment expressed the view that the Amendment itself provides Congress with authority to enact legislation that facilitates the enforcement of state laws regulating alcohol. *Arrow Distilleries*, 109 F.2d at 401; *Old Monastery*, 147 F.2d at 906-907; *Hayes* v. *United States*, 112 F.2d at 422; *Hanf* v. *United States*, 235 F.2d at 717-718; *Harris* v. *State*, 122 P.2d 401, 405 (Okla. Crim. App. 1942); see also de Ganahl, *supra*, 8 Geo. Wash. L. Rev. at 830; Note, *Federal Alcohol Administration Act*, 24 Geo. L.J. 433, 435 (1936). The conclusion that the Twenty-first Amendment is an independent source of congressional authority is not undermined by Congress's removal from the proposed Amendment of a provision (proposed Section 3) that would have given Congress "concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." 76 Cong. Rec. 4138 (1933); see also *324 Liquor Corp.*, 479 U.S. at 353-356 (O'Connor, J., dissenting). The omission of proposed Section 3 appears to have been prompted by concern that it would enable the federal government to regulate at the local level in a manner that was inconsistent with state regulation of alcohol. 76 Cong. Rec. 2776 (remarks of Rep. Lea), 4143 (remarks of Sen. Blaine), 4144 (remarks of Sen. Wagner), 4146 (remarks of Sen. Borah), 4147 (remarks of Sen. Wagner), 4155 (remarks of Sen. Brookhart), 4156 (remarks of Sen. Hebert), 4173 (remarks of Sen. Borah), 4173, 4177 (1933) (remarks of Sen. Black). The labeling and advertising restrictions in the FAAA do not implicate that concern, because they govern only alcoholic beverages that

of federal assistance to support the States' efforts to regulate alcohol requires that the federal labeling restriction be reviewed under the same standard that applies to the state laws that it was enacted to support.[36]

3. The federal labeling restriction is plainly constitutional under the *LaRue* standard.

First, the labeling restriction is reasonably related to preventing a harm that Congress rationally sought to avoid. It is based on Congress's judgment that "[m]alt beverages should not be sold on the basis of alcoholic content." H.R. Rep. No. 1542, *supra*, at 12. Here, as in *LaRue*, that legislative judgment was justified by "evidence from the [legislative] hearings" of particular abuses and by "the principle that [a legislature] may reason from the particular to the general." 409 U.S. at 115. Thus, Congress's conclusion that competition among brewers on the basis of high alcohol content should be prohibited was

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move or are intended for movement in interstate commerce, and they apply in a manner that is consistent with state regulation. In any event, this Court need not resolve the issue of whether the Twenty-first Amendment is an independent source of congressional authority in deciding whether to apply the principle of *LaRue* in this case. In our view, *LaRue* governs here because the FAAA is within Congress's authority under the Commerce Clause, see *William Jameson & Co.* v. *Morgenthau*, 307 U.S. 171, 173 (1939) (per curiam) (challenge to FAAA raised "no substantial question of constitutional validity"); see also Appellant's Statement as to Jurisdiction at 8-10, *William Jameson & Co.* v. *Morgenthau*, No. 717 (O.T. 1938) (arguing, *inter alia*, that FAAA exceeded congressional authority under Commerce Clause); Brief for Appellant at 22-23, *William Jameson & Co.* v. *Morgenthau*, No. 717 (O.T. 1938) (same), and because Section 205(e)(2) is designed to enhance the enforcement of state alcohol laws.

[36] In States that have expressly adopted the federal labeling restriction as state law or otherwise adopted the same substantive restriction, see pp. 10-11 & nn.8, 10, *supra*, the validity of the federal restriction appears to be compelled by the text of the Twenty-first Amendment, which states in relevant part: "The transportation or importation into any State * * * for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. Amend. XXI, § 2.

"not * * * an irrational one." *Id.* at 116. It accordingly must be sustained under *LaRue*.

Moreover, the means chosen by Congress to prevent such competition likewise must be sustained under *LaRue*. *LaRue* gives a legislature "wide latitude as to choice of means." 409 U.S. at 116. Congress acted within that broad latitude in prohibiting statements of alcohol content on malt-beverage labels. Here, as in *LaRue*, "[n]othing in the record * * * or in common experience compels the conclusion" that other means—such as a labeling restriction applicable only to malt liquor or a requirement that alcoholic-beverage labels include warnings of the health dangers of alcohol—would have been equally effective in achieving the legislative goal. *Ibid.* Thus, the fit between the legislative means and the legislative ends "cannot * * * be deemed an unreasonable one," *ibid.*, and it therefore satisfies the *LaRue* standard. Section 205(e)(2) thus comports with the First Amendment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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